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No. 01-656

IN THE
Supreme Court of the United States

A.D. BEDELL WHOLESALE COMPANY, INC., TRIANGLE CANDY & TOBACCO CO., on behalf of themselves and all others similarly situated,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, INC., BROWN AND WILLIAMSON TOBACCO CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The four largest cigarette manufacturers, having a 98% share of the nationwide market, entered into a settlement agreement with 46 States to resolve lawsuits brought by the States against them. The settlement agreement contains provisions that substantially penalize any firm entering into that agreement including smaller competitors, who later signed on to the agreement for exceeding their agreed upon output. Two cigarette wholesalers brought this antitrust action on behalf of all direct buying wholesalers claiming that the output restriction is illegal *per se* under the antitrust laws. The court below held that the manufacturers' acts in furtherance of the output restrictions were immune from antitrust scrutiny under the *Noerr-Pennington* doctrine even though they did not qualify as state action under this Court's decision in *Parker v. Brown*:

1. Does the *Noerr-Pennington* doctrine immunize an output cartel controlling an entire interstate market because the provisions creating it were inserted into a settlement agreement with a group of states?

2. Does the *Noerr-Pennington* doctrine apply to an output cartel's post-petitioning anticompetitive conduct that has no antitrust immunity under state action doctrine?

3. Do the Supremacy Clause, the Commerce Clause and the Compact Clause preclude a group of States from using the *Noerr-Pennington* doctrine to immunize the operation of an interstate output cartel?

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OTHER AUTHORITIES

I Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) 3, 10

S. Calkins, Developments in Antitrust and the First Amendment: The Disaggregation of Noerr, 57 Antitrust L.J. 327 (1988) 7

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BRIEF AMICUS CURIAE FOR THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute is an independent non-profit education, research, and advocacy organization

[1] This brief is submitted pursuant to Supreme Court Rule 37.2(a), as all parties have consented, through counsel, to its filing. Their written consent is on file with Clerk of the Court. With regard to the mandatory disclosures required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person other than the American Antitrust Institute or its counsel made a monetary contribution to the preparation or submission of this brief.

concerned with the integrity of antitrust enforcement. Its Advisory Board includes leading law professors, economists, business school professors, and other experts on antitrust and competition policy. The group promotes the vigorous use of antitrust policy as a vital component of national competition policy. The organization's background and work product may be found on the Internet at www.antitrustinstitute.org.

In the instant case, the American Antitrust Institute is particularly interested in the Third Circuit's unprecedented application of the *Noerr-Pennington* doctrine. As a result of its broad consumer and cross-industry perspective, the American Antitrust Institute is uniquely placed to address the impact of this decision beyond the instant case argued by Petitioners. In particular, AAI believes the Third Circuit's decision has generated significant uncertainty regarding the application of the *Noerr-Pennington* doctrine to anticompetitive conduct contemplated in settlement agreements, conflicting with long-standing Circuit court and Supreme Court precedent. For these reasons, the American Antitrust Institute respectfully submits this brief as *amicus curiae*.

STATEMENT OF FACTS

In order to avoid unduly burdening this Court, the American Antitrust Institute adopts the statement of facts presented by the Third Circuit and by Petitioners in their petition for a writ of certiorari.

SUMMARY OF ARGUMENT

It is well-settled that the *Noerr-Pennington* doctrine immunizes private actors from antitrust liability for petitioning activities undertaken in an attempt to secure government action, even if that government action would restrain trade. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). The *Noerr-Pennington* doctrine also immunizes these private

actors from antitrust liability if their petitioning succeeds and the subsequent *government* conduct does in fact restrain trade. *Pennington*, 381 U.S. at 671; I Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 202c at 159-62 (2d ed. 2000) (hereafter "Areeda"). By immunizing, *inter alia*, subsequent *private* conduct, however, the Third Circuit's opinion in *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir. 2001)(Pet. App. 1a-62a) conflicts with settled law.

As noted in the leading antitrust treatise, a "private party is not immune where the operative restraint results from its own private action inadequately supervised by the government." Areeda ¶ 229 at 519. Indeed, "courts distinguish the harm caused directly by the private parties from that caused by the government itself" because private parties petitioning the government are entitled to *Noerr-Pennington* immunity only "where government is the key deciding force." *Id.* ¶ 202c at 161, ¶ 229 at 519. In the case of successful petitioning, therefore, *Noerr-Pennington* immunity applies only to post-petitioning anticompetitive conduct that "is the result of valid government action, as opposed to private action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (quoting *Noerr*, 365 U.S. at 136). Accordingly, while a "private party is completely immune *for seeking* [government action] . . . [the *Noerr-Pennington* doctrine] provides no shield for the private party's own subsequent market behavior," even if the private party is behaving under the auspices of prior government action resulting from its petitioning. Areeda ¶ 229 at 520-21 (emphasis in original).

In holding, *inter alia*, that the unsupervised post-settlement operation of an output cartel by private defendants is immune under the *Noerr-Pennington* doctrine, the Third Circuit's *Bedell* decision directly conflicts with well-settled law of other Circuit Courts of Appeal and this Court. In order to eliminate this conflict and related uncertainty facing litigants, this Court should grant the pending petition for a writ of certiorari with respect to the first two Questions

Presented.[2] Neither the identity of the parties agreeing to the underlying settlement nor the magnitude of their settlement should interfere with this Court applying the rule of law. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-22 (1990) (even assuming that the allegedly anticompetitive conduct produced a "worthwhile" and otherwise unobtainable result, such "assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom" of the challenged conduct).

ARGUMENT

A. THE THIRD CIRCUIT'S APPLICATION OF THE NOERR-PENNINGTON DOCTRINE IS UNPRECEDENTED

The Third Circuit's unprecedented expansion of the *Noerr-Pennington* doctrine is especially stark in light of three other findings in the *Bedell* decision. First, the *Bedell* Court held that the plaintiffs properly pleaded that the tobacco manufacturers' conduct constituted an antitrust violation under the Sherman Act. Pet. App. 22a-23a. Second, the *Bedell* Court held that the anticompetitive injury at issue was proximately caused, *inter alia*, by the post-settlement conduct of the private defendants – operating the output cartel and raising prices – not merely by the signing of the settlement agreement or conduct by government officials. *Id.* at 40a-41a ("the anticompetitive injury here resulted from the tobacco companies' conduct after the implementation of the Multistate Settlement Agreement," and "we focus not on the negotiation and consummation of the Multistate Settlement Agreement, but on its actual *operation* and resulting effects, since that is the true cause of the anticompetitive effects"). Third, the *Bedell* Court held that the only other basis for immunity claimed by defendants – state action immunity under the

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[2] The American Antitrust Institute does not take any position regarding the third Question Presented.

Parker doctrine – does not apply to this anticompetitive conduct. *Id.* at 59a-60a.

The novelty of the *Bedell* holding at issue here – that post-settlement conduct by private firms is immune from antitrust challenge if previously contemplated in a settlement agreement with government officials – is belied by the Third Circuit's failure to offer any supporting authority. The closest the *Bedell* court comes to asserting that subsequent conduct by private actors is immune under the *Noerr-Pennington* jurisprudence is in its discussion of *Campbell v. City of Chicago*, 823 F.2d 1182 (7th Cir. 1987). Such reliance on the Seventh Circuit's decision in *Campbell*, however, is misplaced.

In *Campbell*, two taxicab companies agreed to settle a lawsuit they had filed against the City of Chicago "in exchange for a favorable [new] ordinance." Shortly thereafter, the taxicab companies engaged in a lobbying campaign supporting passage of the new ordinance, and the City enacted it. Alleging that this ordinance restrained trade, taxicab drivers filed an antitrust action against the City and the taxicab companies. The Seventh Circuit properly affirmed the lower court's decision that the taxicab companies' settlement and ensuing lobbying efforts were immunized from antitrust liability under the *Noerr-Pennington* doctrine. *Campbell*, 823 F.2d at 1185-87. This holding is inapplicable to the facts of *Bedell*, however, because the private post-settlement conduct at issue in *Campbell* (encouraging the City to pass the new ordinance) constituted an attempt to influence subsequent government action, and only this subsequent government action – *not* the private conduct itself – could have had anticompetitive effect.

In contrast, the private post-settlement conduct at issue in *Bedell* (operating an output cartel and raising prices) was not intended to influence government action at all, and this

private conduct itself had the direct anticompetitive effect.[3] The difference is crucial in the context of the *Noerr-Pennington* doctrine because, as noted by a leading antitrust commentator, "courts distinguish the harm caused directly by the private parties from that caused by the government itself." Areeda, ¶ 202c at 161; *see also Noerr*, 365 U.S. at 135-36 (holding there is no violation of the antitrust laws by private actors where the restraint upon trade "is the result of valid governmental action, as opposed to private action"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (noting that absent such a distinction "competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports"). In light of this distinction, *Campbell* provides no support for the *Bedell* Court's holding that, *inter alia*, private post-settlement conduct is immune under the *Noerr-Pennington* doctrine.

Moreover, authority that is on point conflicts with this holding in *Bedell*. As discussed below, it is well-settled that non-petitioning conduct is not entitled to *Noerr-Pennington* immunity, that private conduct taken as a "consequence" of prior government action does not constitute petitioning, and that even the explicit approval of government officials does not immunize subsequent private conduct.

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[3] Although not cited in *Bedell*, other cases have addressed the applicability of the *Noerr-Pennington* doctrine to the Master Settlement Agreement at issue in *Bedell*. Like *Campbell*, these cases are not on point. They properly apply *Noerr-Pennington* immunity to conduct such as the negotiation of the settlement agreement, the decision to enter into it, and the subsequent passage of related state laws called for in the agreement. However, they do not address the applicability of the *Noerr-Pennington* doctrine to the private parties' post-settlement operation of an output cartel. *See PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1193 (C.D. Cal. 2000); *Hise v. Philip Morris Inc.*, 46 F. Supp. 2d 1201, 1205-07 (N.D. Okla. 1999), *aff'd*, 208 F.3d 226 (10th Cir. 2000); *Forces Action Project LLC v. California*, No. C 99-0607 MJJ, 2000 WL 20977, at *8 (N.D. Cal. Jan. 5, 2000), *aff'd in part, rev'd & remanded in part*, No. 00-15280, 2001 WL 923124 (9th Cir. Aug. 15, 2001).

B. NON-PETITIONING CONDUCT IS NOT IMMUNIZED BY THE NOERR-PENNINGTON DOCTRINE

The *Noerr-Pennington* doctrine immunizes only conduct which constitutes "petitioning" of government officials. Non-petitioning private conduct is immune, if at all, under the *Parker* state action doctrine. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, Inc., 445 U.S. 97, 104 (1980) (establishing test to determine if anticompetitive private conduct qualifies as state action for purposes of *Parker* immunity). This contrast reflects the fact that while the *Parker* and *Noerr-Pennington* doctrines "are complementary expressions of the principle that the antitrust laws regulate business, not politics," they are quite distinct. Pet. App. 23a-24a (internal quotation marks omitted).

First, they have disparate doctrinal foundations, with the *Parker* doctrine based upon the states' constitutional status as at least qualified sovereigns, and the *Noerr-Pennington* doctrine based upon either the First Amendment or a statutory interpretation of the antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 351 (1943) (state action immunity based upon the "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may subtract their authority"); S. Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 Antitrust L.J. 327 (1988) (discussing the possible Constitutional/statutory bases of the *Noerr-Pennington* doctrine). Second, it follows that the jurisprudential application of these doctrines differs, as well. Although anticompetitive conduct by private parties that does not constitute "petitioning" may be immune under the *Parker* doctrine, it cannot be immune under the *Noerr-Pennington* doctrine as a matter of law. *See Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (no *Noerr-Pennington* immunity where conduct causing the anticompetitive harm was not "joint petitioning," as alleged, but "in fact nothing more than action in a private marketplace"); *Allied Tube*, 486 U.S. at 507 (the *Noerr-Pennington* doctrine does not

immunize "what are in essence commercial activities simply because they have a political impact").

In *Bedell*, the Third Circuit appropriately distinguishes between these two doctrines, implicitly recognizing that non-petitioning conduct is not immunized under the *Noerr-Pennington* doctrine. Accordingly, the *Bedell* Court's *Noerr-Pennington* analysis focuses on determining whether the private conduct in question "fits within the context of protected petitioning envisioned by the *Noerr-Pennington* doctrine." Pet. App. 27a.

C. *NOERR-PENNINGTON* "PETITIONING" DOES NOT INCLUDE POST-SETTLEMENT CONDUCT BY PRIVATE PARTIES

As already noted, "the anticompetitive injury [at issue in *Bedell*] resulted from the tobacco companies' conduct *after* implementation of the Multistate Settlement Agreement, and not from any further positive action by the states." Pet. App. 41a (emphasis added). The *Bedell* Court believed that this post-settlement conduct by private parties – including both the implementation of the cartel and the accompanying price increases – was entitled to *Noerr-Pennington* immunity as "petitioning." *See id.* at 22a, 56a-57a (plaintiffs alleged their injuries stemmed from the major tobacco companies' unsupervised operation of the cartel and decision to charge "artificially high prices"). Defining "petitioning" to include private post-settlement conduct, however, is improper.

Petitioning in the context of the *Noerr-Pennington* doctrine has been interpreted to include the use of all "channels and procedures of state and federal government" by private actors, but only in an attempt to influence prospective government decision-making or action. *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); Areeda ¶ 229 at 519 (private parties are immune only "where government is the key deciding force"). For example, a private firm's use of the courts to file and prosecute a non-

sham[4] lawsuit against either a private or government adversary, constitutes "petitioning." *California Motor Trans. Co.*, 404 U.S. at 510-11. Likewise, conduct incidental to such litigation – including even private parties' decisions whether or not to enter into a settlement agreement – is entitled to "petitioning" immunity because otherwise the underlying litigation itself would be chilled. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993) ("[a] decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit" and therefore is entitled to the same immunity, if any, of the underlying lawsuit); *see also Primetime 24 Joint Venture v. National Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000) (enumerating other conduct incidental to such litigation that is immunized under the *Noerr-Pennington* doctrine). Direct petitioning of a government adversary in the course of litigation (*e.g.*, to accept a given settlement agreement) also is immune under the *Noerr-Pennington* doctrine. While far from an exhaustive list of "petitioning" activities, these examples share at least one common element with all private conduct entitled to *Noerr-Pennington* immunity: they are intended (either alone or in conjunction with other conduct) to influence prospective government decision-making or action, and thus can have only an indirect anticompetitive effect.

In contrast, the private post-settlement conduct at issue here is not intended to influence any prospective government decisions-making or actions, but rather is intended to have a

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[4] The limited nature of the *Noerr-Pennington* doctrine is further evidenced by the fact that not even all "petitioning" is entitled to immunity. For example, so-called "sham" or bad faith petitioning is not immune from antitrust challenge. Petitioning is characterized as a "sham" in the context of the *Noerr-Pennington* doctrine when a private actor engages in it with no objective basis for success, but instead with the intention of delaying, imposing costs upon, or otherwise harassing its competitors regardless of the outcome. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

direct anticompetitive effect on the market. According to the *Bedell* court, such private conduct occurring subsequent to the successful petitioning for a settlement is entitled to *Noerr-Pennington* immunity even when it does not qualify for state action immunity under the *Parker* doctrine. Indeed, under this logic it follows that such private conduct – the operation of a cartel and the accompanying price increases – would be entitled to *Noerr-Pennington* immunity even if no settlement was reached, as long as the petitioning for a settlement took place! *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57-61 (1993) (even unsuccessful petitioning can be immune under the *Noerr-Pennington* doctrine).

This attempt to broaden the definition of "petitioning" to include such post-settlement conduct by private firms is misplaced.[5] As noted by one of the leading antitrust commentators, although a private party is entitled to *Noerr-Pennington* immunity for "seeking" a specific government action, even if the government undertakes this action the "*Noerr* [*-Pennington* doctrine] provides no shield for the private party's own subsequent market behavior" permitted or even compelled by this government action. Areeda ¶ 229 at 520-21. Moreover, all "petitioning" related to a lawsuit ceases by definition once a settlement agreement is finalized: the lawsuit is no longer pending before the court, conduct incidental to the lawsuit is therefore no longer possible, and the government adversary is no longer deciding whether or not to settle.

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[5] Such a broadening also would be inconsistent with Supreme Court case law regarding interpretation of the analogous antitrust exemptions implied by certain federal statutes. Such implicit repeals of the antitrust laws are "not favored" and recognized "only if necessary to make the [statutory scheme] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). By analogy, unprecedented expansions of the scope of common law antitrust immunities such as the *Noerr-Pennington* doctrine should be disfavored.

Thus, even if the negotiation of a settlement and the act of accepting it are immunized from antitrust liability, the settlement agreement itself may be challenged as a violation of the antitrust laws. *See, e.g., Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 2001-2 Trade Cas. (CCH) ¶ 73,363, at 91,089-90 (D.C. Cir. 2001) (agreement between private litigants that was like a settlement agreement to allocate markets was not entitled to *Noerr-Pennington* immunity); *Hartford Empire Co. v. United States*, 323 U.S. 386, *clarified*, 324 U.S. 570 (1945) (settlement unlawful as part of an anticompetitive scheme). Indeed, it is well-settled that any contract, including a settlement agreement, is void to the extent it restrains trade. *See generally* RESTATEMENT (SECOND) CONTRACTS §186 ("[a] promise is unenforceable on grounds of public policy if . . . its performance would limit competition in any market").

In addition to the contract itself being unenforceable, the actual conduct contemplated in such an anticompetitive settlement agreement is also susceptible to antitrust challenge. *See, e.g., Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (anticompetitive restraint contained in a settlement agreement unlawful under the Sherman Act). On point is *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 375-76 (7th Cir. 1987), in which Judge Easterbrook specifically held that the *Noerr-Pennington* doctrine does not immunize anticompetitive conduct contemplated in a settlement agreement, concluding that "[t]here is no such thing as the lawful enforcement of a private cartel."

Although the *Noerr-Pennington* doctrine provides immunity for private actors petitioning the government, once the government action that was the object of the petitioning has been taken, immunity for subsequent private conduct must be found somewhere else. Neither the *Bedell* settlement agreement itself nor private post-settlement conduct contemplated in the settlement agreement constitutes "petitioning," and therefore neither is entitled to the cloak of *Noerr-Pennington* immunity.

D. PRIOR APPROVAL BY GOVERNMENT OFFICIALS DOES NOT IMMUNIZE SUBSEQUENT PRIVATE CONDUCT

Finally, the mere fact that anticompetitive conduct undertaken by a private party was contemplated in an agreement previously entered into with government officials does not immunize that conduct from antitrust attack. As the Supreme Court held in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378-79 (1973), the fact that "provisions [restraining trade] were contained in a contract with the [federal government] is not material [to the issue of immunity because] . . . government contracting officers do not have the power to grant immunity from the Sherman Act." (Internal quotation marks omitted.) Settlement agreements are no exception:

> [A] consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties.

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 13 (1979).[6]

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[6] The Third Circuit's contention that *Broadcast Music* is "easily distinguished" from *Bedell* falls short. Pet. App. 30a. The fact that there was a "consent agreement" rather than a "settlement agreement" in *Broadcast Music* is a distinction without a difference, as both are contracts between private litigants and government officials in which they agree to settle the pending lawsuit. *Id.* Indeed, the *Bedell* Court itself insists that, "we are bound by holdings, not language." *Id.* (Internal quotation marks omitted.) The Third Circuit's other argument – that *Broadcast Music* is distinguishable because neither it nor a prior case it relies upon, *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961), cited the *Noerr-Pennington* doctrine by name – also constitutes an exaltation of form over substance, as the *Broadcast Music* language quoted above is clearly on point. Moreover, it would have been rather difficult for the Supreme Court to cite the *Noerr-Pennington* doctrine in *Sam Fox* because that case was decided four years prior to *Pennington*.

More generally, prior approval by government officials does not immunize subsequent private conduct from antitrust attack. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Supreme Court held that neither the *Noerr-Pennington* doctrine nor the *Parker* doctrine immunized allegedly anticompetitive private conduct which had been explicitly approved by a state regulatory body and which, by law, could not even be terminated without additional state approval. The *Cantor* Court noted that the mere "authorization, approval, encouragement, or participation" by a state of "restrictive private conduct confers no antitrust immunity." *Id.* at 592-93 (footnotes omitted). Cautioning against an expansive interpretation of the *Noerr-Pennington* doctrine, the Supreme Court also pointed out that the *Noerr* opinion itself does not even address the issue of "private action taken in compliance with state law," let alone immunize such private conduct. *Id.* at 601. Similarly, the Third Circuit held in *Ticor* that the private conduct at issue – price fixing – was not entitled to *Noerr-Pennington* immunity notwithstanding the fact that several states had approved it. *Ticor*, 998 F.2d at 1138. The *Ticor* Court relied on the Supreme Court's holding in *Allied Tube* in concluding that the *Noerr-Pennington* doctrine did not apply because "Ticor's collective rate setting efforts can more aptly be characterized as commercial activity with a political impact . . . than as political activity with a commercial impact." *Id.* (citations and internal quotation marks omitted).

Because the mere imprimatur of government officials does not entitle anticompetitive conduct to *Noerr-Pennington* immunity, the fact that the *Bedell* defendants' operation of an output cartel may have been contemplated in a settlement agreement entered into with several states does not immunize that private conduct from antitrust liability. Moreover, as noted by this Court in rejecting *Noerr-Pennington* immunity despite the challenged conduct's attenuated link to government policy, "[a]lthough one could reason backwards . . . to the conclusion that the conduct at issue here is 'political,' we think that given the context and

nature of the conduct, it can more aptly be characterized as commercial." *Allied Tube*, 486 U.S. at 507.

E. THE THIRD CIRCUIT'S DECISION CREATES UNCERTAINTY REGARDING AN IMPORTANT AND RECURRING FEDERAL QUESTION

The fact that the Third Circuit's *Bedell* decision conflicts with well-settled *Noerr-Pennington* jurisprudence is particularly important because the issue here – application of the *Noerr-Pennington* doctrine to anticompetitive conduct contemplated in a settlement agreement between private defendants and state attorneys general – arises frequently. States regularly invoke their *parens patriae* authority to bring antitrust lawsuits under federal law, and subsequently enter into settlement agreements which are acceptable in the political judgment of the relevant state attorneys general. Such settlement agreements themselves, however, sometimes raise legitimate antitrust concerns from the perspective of the very third party consumers or competitors on whose behalf the relevant state attorneys general ostensibly brought the underlying lawsuits. One example recently before the Middle District of Florida is *In re Disposable Contact Lens Antitrust Litigation*, No. 1030 (M.D. Fla. Nov. 1, 2001) There, several state attorneys general and class counsel entered into a series of settlement agreements with the private defendants. At the FED. R. CIV. P. 23(e) fairness hearing, however, various third parties raised concerns regarding anticipated post-settlement conduct by one of the private defendants which consumers and competitors believe would produce an anticompetitive result. *See, e.g.*, Amicus Brief of the American Antitrust Institute with respect to the Contact Lens Settlement at 5 (July 20, 2001) ("It would be a perverse abuse of antitrust law if [defendant] were permitted to misuse a pro-competitive settlement as an anticompetitive weapon").

The applicability of the *Noerr-Pennington* doctrine to such anticompetitive conduct contemplated in a settlement agreement between private defendants and state attorneys general is not only a commonly recurring issue, it is one of

the very issues addressed by the *Bedell* court. Indeed, there was not even any need to assess the likelihood of prospective anticompetitive effect in the context of the motion to dismiss at issue in *Bedell*, as the plaintiffs alleged in their complaint that they had already suffered injury as a result of the tobacco manufacturers' anticompetitive conduct. Pet. App. 22a. ("Plaintiffs also allege the cartel injured [them] by charging artificially high prices"). As a result of the Third Circuit's immunization of, *inter alia*, such anticompetitive post-settlement conduct in contravention of well-settled *Noerr-Pennington* jurisprudence, however, private actors now face significant uncertainty regarding this important federal question. In order to eliminate this uncertainty, as well, the Court should address the doctrinal conflict created by the *Bedell* decision.

F. THERE WERE, AND ARE, LAWFUL ALTERNATIVES AVAILABLE TO THE *BEDELL* PARTIES

It is possible, of course, that a reversal of the Third Circuit's holding in *Bedell* may disrupt the settlement process currently in place regarding the states' lawsuits against the major tobacco manufacturers. Neither the identity of the parties nor the magnitude of their settlement, however, should interfere with this Court's applying the rule of law. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. at 421-22 (even assuming that the allegedly anticompetitive conduct produced a "worthwhile" and otherwise unobtainable result, such "assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom" of the challenged conduct). Moreover, the *Bedell* defendants could have – and still can – moot any effects of such a legal ruling by undertaking an alternative approach to effectuate their settlement.

Indeed, the parties themselves recognized in 1997 that they could immunize their post-settlement conduct from antitrust liability by means of a congressionally-approved settlement. Pet. App. 5a-7a. It is particularly notable that the 1997 congressional proposal contained an explicit exemption

from the antitrust laws for post-settlement conduct by the tobacco manufacturers. *Id.* (the proposal also called for the major tobacco manufacturers to pay the states nearly $370 billion, or approximately 80% more than agreed to under the current settlement). Apparently both the parties and Congress itself recognized at that time that the contemplated post-settlement conduct would be actionable under the antitrust laws but for such an exemption. Although the 1997 proposal was never approved, there is nothing precluding the parties from seeking congressional approval (including an explicit antitrust exemption) again now.

An alternative to seeking a congressional settlement anew is to follow the legal road map set forth in the Third Circuit's *Bedell* opinion and take steps to satisfy the "active supervision" prong of the *Parker* doctrine, thereby qualifying for immunity under the state action doctrine. *See* Pet. App. 44a-60a. Each state can immunize the private defendants' conduct to the extent it impacts commerce in that state merely by engaging in active supervision of "the parts of the Multistate Settlement Agreement that are the source of the antitrust injury." *Id.* at 52a.[7] In fact, the Third Circuit itself suggested explicitly that "oversight or authority over the tobacco manufacturers' prices and production levels" may well suffice to satisfy this element of the *Parker* doctrine. *Id.* at 56a.

Thus, there were lawful alternatives available to immunize the *Bedell* parties' settlement at the time they entered into it. Moreover, these alternatives remain available

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[7] Of course, any attempt by states participating in the settlement to immunize the private defendants' conduct to the extent it directly impacts interstate commerce in states not participating in the settlement is susceptible to Constitutional challenge. While this issue appears to be insignificant in a case like *Bedell* where 46 states participated in the settlement and only four did not, it would be a substantial concern in a case where, for example, only two states participated in the settlement and 48 did not.

today and could keep the parties' settlement largely intact even if the Third Circuit's decision is reversed.

CONCLUSION

While the specific facts underlying *Bedell* may be unique, the *Noerr-Pennington* issues raised in the case are not. The Third Circuit decision, however, represents an unprecedented expansion of the scope of anticompetitive conduct entitled to *Noerr-Pennington* immunity. In light of this challenge to the doctrine of *stare decisis*, the Supreme Court should clarify its interpretation of the *Noerr-Pennington* doctrine by granting the pending petition for a writ of certiorari with respect to, at least, the first two Questions Presented.

Respectfully submitted,

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